In the High Court of Judicature at Madras

Dated:28.02.2007

Coram

The Honourable Mr.Justice A.C.ARUMUGAPERUMAL ADITYAN

Second Appeal No.763 OF 1997

Gopal ..Appellant/Defendant

vs

1. Kamalam
2. G.Nataraj
3. G.Loganathan ..Respondents/Plaintiff

This second appeal is filed under Section 100 of C.P.C against the judgment and decree dated 5.11.1996 made in A.S.No.102 of 1996 on the file of the Court of Second Additional District Judge, Coimbatore confirming the decree and Judgment in O.S.No.1618 of 1993 dated 16.4.1996 on the file of the Court of III Additional District Munsif, Coimbatore.

For Appellant : Mr.V.Nicholas
For Respondents : Mrs.Usha Tholgappian
for Mr. N.Varadarajan

JUDGMENT

This appeal has been preferred against the Judgment and decree in A.S.No.102 of 1996 on the file of the Court of II Additional District Judge, Coimbatore. The defendant, who has lost his defence before the Courts below, is the appellant herein.

2. The suit is for directing the defendant to demolish the compound wall constructed in the passage of the suit property mentioned as "XY" in the plan by way of mandatory injunction and also for permanent injunction restraining the defendant, his men and agents from interfering with the peaceful possession and enjoyment of plaintiffs by cutting the eves projecting towards the passage in the suit property .

3. The averments in the plaint for the purpose of deciding this appeal sans irrelevant particulars are as follows:

The suit property and the adjacent property on the western side of the suit property are originally belonged to one Ramasamy Naidu, the

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father-in-law of the first plaintiff and grand father of plaintiffs 2 and 3. The above said properties were self acquired properties of Ramasamy Naidu. During his life time, the said Ramasamy Naidu was in possession and enjoyment of the suit property as absolute owner. On 22.7.1953, the said Ramasamy Naidu executed a registered settlement deed in respect of the suit property in favour of his two sons viz., Rangawamy Naidu and Gurusamy Naidu, who was the husband of the first plaintiff and the father of the plaintiffs 2 and 3. Rangasamy Naidu and Gurusamy Naidu were in possession and enjoyment of the suit property as an absolute owners till 27.11.1960.

3a) On 27.11.1960, the said Rangasamy Naidu , the brother of Gurusamy Naidu executed a registered sale deed in respect of his share in the suit property in favour of his brother Gurusamy Naidu and thereby Gurusamy Naidu became the absolute owner of the suit property ever since 27.11.1960 and in possession and enjoyment of the suit property till 1978. The original settlement deed and the sale deed are produced. The said Gurusamy Naidu died in the year 1978 leaving behind the plaintiffs as his legal heirs. Now the plaintiffs are in possession and enjoyment of the suit property and are paying tax in the name of deceased Gurusamy Naidu.

3b) Door Nos. 61 to 64 are assigned to the house in the suit property. The buildings in the suit property are aged more than 60 years. The defendant is the adjacent owner of the suit property situate on the eastern side of the suit property. The defendant is now constructing the new building. In between the properties of the plaintiffs and the defendant, there is a north-south passage measuring about 4 feet width on the northern side while about 5'3" on the southern side and in existence for more than 60 years. Both the plaintiffs and their predecessors-in-title and the defendant are using the said passage in common. The plaintiffs are entitled to about two feet in the said passage. The plaintiffs are using the said passage for white washing and repairing the eastern north-south wall belonged to the plaintiffs, cleaning the drainage situate immediately on the eastern side of the north-south wall.

3c) In fact, the plaintiffs are having an entrance in the above said eastern north-south wall to reach the said passage on the southern side, through the said entrance only the plaintiffs are doing the above mentioned aspects. The eves of the tiled rooofing are projecting about 2 feet in the said passage and plaintiffs are having easementary rights and enjoyed the same for more than the prescribed period. The defendant has constructed a new building to the east of the said passage. While the plaintiffs' family were absent during the third week of July 1993, in order to deprive the lawful rights of the plaintiffs in the said passage, the defendant with an ulterior motive hurriedly constructed the compound wall in the said passage blocking the entrance and thereby encroached about 1'6" space through out in the passage belonged to the plaintiffs. The action of the defendant was highly illegal and unwarranted. When the

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plaintiffs returned and on seeing the unlawful acts done by the defendant, the plaintiffs requested the defendant to remove the constructed compound wall.

3d) Even though the defendant agreed, he has not chosen to remove the same. Unless the compound wall constructed in the passage is demolished by means of mandatory injunction, the plaintiffs will be put to much hardship and great difficulties. The defendant, on 7.8.1993, made an attempt to cut off the eves projecting towards the passage in order to raise the compound wall and the same was rightly resisted by the plaintiffs. The plaintififs are having the easementary rights over the eves. Hence the suit.

4. The defenant in his written statement would contend as follows: The ownership of the suit property of the plaintiffs is admitted. The plaintiffs are living in the same building. The plaintiffs are not entitled to two feet space on the east of the building. The settlement deed and the sale deed do not refer to vacant space on the east of the building that the plaintiffs' building face north, the entry is from north. The alleged opening in the eastern north-south wall is not permanent. It has been created recently to sustain the false suit claim. It is not correct to say that the passage on the east is common. The allegation that the eves project over the passage are in correct. The projecting eves do not acquire any right. The opening in the eastern north-south wall is of recent construction. The construction has been going on for over 1 ½ years. The defendant has not encroached 1 ½' in the lane as alleged in the plaint. The defendant put up compound wall over the demarcation line that existed from time immemorial. The plaintiffs were aware of the construction and kept silent till the construction was over. The building of the defendant had been constructed long prior to the suit. The averment of easementary right as alleged in the plaintiff is not true. There is no document to prove 2' passage of the plaintiff. The plaintiff has no cause of action. The defendant pulled down the old constructioon and had raised the new building at a considerable cost. The plaintiffs have been taking only gutter from the southern end to northern end. Even after the construction,the gutter runs smoothly. The averments that the plaintiffs have acquiried the area under the roof, under right of easement is not true and cannot be sustained in law. Taking advantage of it, the plaintiffs are claiming 2 feet space on the east of their building. The defendant has put up construction with the knowledge of the plaintiffs. Hence the suit is liable to be dismissed.

5. On the above pleadings, the learned trial Judge has framed five issues for trial. P.W.1 to P.W.3 were examined and Exs P1 to P6 were marked on the side of the plaintiffs. D.W.1 was examined and Exs B1 and B2 were marked. A Commissioner was appointed in this case and his report is Ex C1 and his plan is Ex C2.

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6. After meticulously analysing the evidence both oral and documentary let in before the trial Court, the learned trial Judge has come to a conclusion that the plaintiffs are entitled to the relief asked for in the plaint and consequently, decreed the suit with costs as prayed for, giving two months time to the defendant to remove the compound wall. Aggrieved by the Judgement of the learned trial Judge, the defendant has preferred an appeal in A.S.No.102 of 1996 before the II Additional District Judge, Coimbatore. The learned first appellate Judge in full conformity with the findings of the learned trial Judge has concurred with the findings of the trial Judge dismissed the appeal thereby confirming the decree and judgment of the learned trial Judge which necessitated the defendant to prefer this second appeal.

7. The substantial questions of law involved in this appeal are

> " 1. When the defendant is disputing the right and interest of the plaintiffs over the property in question and the plaintiffs have filed the suit for injunction without seeking the relief of declaration of title, whether the Courts below are correct in granting a decree?
>
> 2. When the defendant was constructing the compound wall for over one and a half years with the knowledge of the plaintiffs and having failed to raise any objection for such construction whether the plaintififs are not estopped from claiming relief of mandatory injunction?

8. Heard Mr.V.Nicholas, learned counsel appearing for the appellant and Mrs.Usha Tholgappian, learned counsel appearing for the respondents and considered their respective submissions.

9.The Points:

The plaintififs have filed the suit for mandatory injunction for removal of a compound wall said to have been constructed by the defendant in the passage existing between the defendant's property and the plaintiffs' property on the northern side and also for permanent injunction restraining the defendant from meddling with in any manner the eves projecting towards east on the said passage. The foremost point to be considered in this case is whether the alleged constructions of the compound wall of the defendant on the eastern side of the plaintiffs' property comes within the property of the plaintiffs or it comes within the defendant's property.

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10. Ex A2 sale deed is in the name of the plaintiffs' husband Gurusamy Naidu dated 27.11.1960 alleged to have been executed by Gurusamy Naidu's brother Rangasamy Naidu. Admittedly, the plaintiffs are the legal heirs of Gurusamy Naidu who is now no more. The property scheduled to Ex A2 reads that the property south of Trichy road, north of house of Rangasamy Naidu, west of Poomalai Chettiar and east of house of Ramasamy Naidu was sold. So there are definite boundaries on all four sides of the property purchased by Gurusamy Naidu under Ex A2. The defendant Gopal is the son of Poomalai Chettiar. The measurements of all four sides were given in Ex A2 for the property sold under Ex A2. The northern boundary on the north of the property sold under Ex A2 is 37 ½ feet , the eastern boundary for the said property is 75 feet. The southern boundary is 39 feet on the western side 74 ½ feet.

11. A Commissioner was appointed in this case and he has filed Ex C1 report and Ex C2 plan. To Exs C1 and C2, admittedly, the defendant has not filed any objection. The Commissioner in his report has observed that he has measured the property and noted the measurements for the plaintiffs' property(at paragraph 5 wrongly mentioned as respondent's property). The Commissioner has noted the measurements for northern boundary in the suit property as 35' 9" but actually the plaintiffs are entitled to 37 ½ feet as per Ex A2. On the south,the measurements for the plaintiffs' property have been shown as 37' but as per Ex A2, the plaintiffs are entitled to 39'. There is no possibility for the western plot owner viz., Ramasamy Naidu to encroach towards east on the plaintiffs' property because a house is situate on the west of the plaintiffs' property,only on the north, there is a passage. So if at all any encroachment is to be made that is only to be made by the defendant who is having his property immediately on the east of the plaintiffs' property which commence with 4 feet' width passage. The defendant has not produced any document or let in any evidence to show that he is short of area in his property which is situated immediately east of the plaintiffs' property . There is absolutely no allegation on the side of the defendant that the plaintiffs have encroached into the passage which is situate immediately on the east of the plaintififs' property. So it is clear from Exs C1 and C2 that the defendant has encroached upon 1' 9" on the northern boundary of the plaintiffs and also about 2' on the southern boundary. In paragraph 7 to the plaint in the cause of action column, the plaintiffs have clearly stated that the defendant has encroached upon 1' 6 " towards their property all along the passage. Under such circumstances, the plaintiffs are entitled to a mandatory injunction in respect of 1'6" all along on the north south newly constructed compound wall by the defendant in the passage and also permanent injunction as prayed for in respect of the eve of their building towards east over the passage. Both the courts below have come to a correct conclusion that the plaintiffs are entitled to the relief asked for in the plaint which do not warrant any interference from this Court. Points are answered accordingly.

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12. In fine, the appeal is dismisised confirming the decree and judgment in A.S.No.102 of 1996 on the file of the Court of Second Additional District Judge, Coimbatore with costs. The plaintiffs are entitled to a mandatory injunction in respect of 1' 6 " all along on the north south newly constructed compound wall on the east as shown in Ex C2 Plan.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Second Additional District Judge, Coimbatore
2. The III Additional District Munsif, Coimbatore

Copy to

The Record Keeper,
V.R.Section, High Court, Madras.

1 cc To Mr.V.Nicholas, Advocate, SR.12551.

Second Appeal No.763/1997

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